JAN 3 1981
CLERK

No. 80-890 OCTOBER TERM, 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. LIOTTA,
Petitioner

v.

NATIONAL FORGE COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard H. Zamboldi, Esquire
ELDERKIN, MARTIN, KELLY,
MESSINA & ZAMBOLDI
800 Commerce Building
Erie, Pennsylvania 16501
(814) 453-7129
Counsel for Respondent

QUESTION PRESENTED

Did the Court of Appeals err in applying the Pennsylvania statute of limitations governing suits to vacate an arbitration award to Petitioner's post-arbitration Section 301 action seeking from his employer alone the identical remedy denied in final and binding arbitration?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

I. Table of Authorities 1

II. Statement of the Case 2

III. Argument in Opposition to Petition for Writ of Certiorari 3

IV. Conclusion 6

I. TABLE OF AUTHORITIES

Cases	Page
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S. Ct. 1048 (1966)	5
Humphrey v. Moore, 375 U.S. 335, 84 S. Ct. 363 (1963)	3
International Union, UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S. Ct. 1107 (1966)	3, 4
Mitchell v. United Parcel Service, 624 F.2d 394, (2nd Cir., 1980), *cert. granted,* 49 U.S.L.W. 3270 (No. 80-169, 1980 Term)	4, 5
Smart v. Ellis Trucking Co., Inc., 580 F.2d 215 (6th Cir., 1978), *cert. den.,* 440 U.S. 958 (1979)	4
United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343 (1960)	3
United Steelworkers of America v. Enterprise Corp., 363 U.S. 593, 80 S. Ct. 1358 (1960)	3

Statutes and Rules

Pennsylvania General Arbitration Act, Section 13, 5 Pa. C.S. § 173	3
Labor Management Relations Act, Section 301, 29 U.S.C. § 185	2
Fed. R. C. P. 8 (c)	5

II. STATEMENT OF THE CASE

Petitioner was discharged from his employment with Respondent on March 16, 1976. The collective bargaining agreement between Petitioner's Union and Respondent provided for final and binding arbitration of such a discharge. The arbitration provisions were pursued and an arbitration award, dated August 3, 1976, sustained Petitioner's discharge.

On March 16, 1978, Petitioner filed the instant action pursuant to Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185. The Respondent moved to dismiss the Section 301 claim on the ground that it was time barred. On May 22, 1978, the District Court denied the Respondent's Motion to Dismiss. Subsequently, the District Court granted Respondent's Motion for Summary Judgment on grounds unrelated to the Motion to Dismiss.

Petitioner appealed the grant of summary judgment to the Court of Appeals and Respondent cross-appealed the District Court's denial of its Motion to Dismiss.

On September 10, 1980, the Court of Appeals affirmed the District Court's entry of judgment for Respondent but based its decision on the ground that Petitioner's Section 301 action was time barred and that Respondent's Motion to Dismiss should have been granted by the District Court.

Petitioner seeks a Writ of Certiorari to review the Circuit Court's ruling on Respondent's original Motion to Dismiss.

III. ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Petitioner's appeal to this Court's traditional concern with conflicting decisions in the various federal circuits asserts that the decision of the Third Circuit is in conflict with decisions of the Second and Sixth Circuits on the question presented. A comparison of the relevant decisions reveals a fundamental difference between the instant case and those decided by the Second and Sixth Circuits - a difference which was expressly recognized by the Third Circuit in its opinion.

The Third Circuit, in accordance with this Court's directive in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107 (1966), was required to select the most appropriate Pennsylvania limitations period for a Section 301 action where the action is against *an employer only* seeking to relitigate a contractual question already resolved by final and binding arbitration. The action was not against the Union and sought no remedy from the Union for a breach of the duty of fair representation. The Third Circuit properly characterized "the nature" of Petitioner's action as an attempt "to vacate the arbitrator's decision" and "to litigate before the District Court the same claim he presented to arbitration. . . ." Accordingly, the Third Circuit determined that the state limitations period which was most consistent with both the nature of Petitioner's action and the larger goals of federal labor policy was the three month limitations period of Section 13 of the Pennsylvania General Arbitration Act, 5 Pa. C.S. § 173. This decision is undeniably consistent with this Court's oft-repeated references to the federal statutory policy favoring rapid and final resolution of labor disputes in general and labor arbitration specifically. *See, e.g., United Steelworkers of America v. Enterprise Corp.*, 363 U.S. 593, 599, 80 S. Ct. 1358 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566, 80 S. Ct. 1343 (1960); and *Humphrey v. Moore*, 375 U.S. 335, 351, 84 S. Ct. 363 (1963).

The Third Circuit expressly emphasized the fact that Petitioner's action was against the Respondent employer *only*, and not against

the union. By contrast, the plaintiffs in both *Mitchell v. United Parcel Service*, 624 F. 2d 394 (2nd Cir., 1980), *cert. granted*, 49 U.S.L.W. 3270 (No. 80-169, 1980 Term) and *Smart v. Ellis Trucking Co., Inc.*, 580 F.2d 215 (6th Cir., 1978), *cert. den.*, 440 U.S. 958 (1979), relied upon by Petitioner as being "in conflict" with the instant case, had elected to pursue relief both from their former employers (on the basis of wrongful discharge) and from their unions (on the basis of an alleged breach of duty of fair representation). This distinction from the instant case is fundamental to the proper characterization of Petitioner's Section 301 claim. An action against the employer alone is a clear and unequivocal attempt to vacate the arbitration award and relitigate the dispute in another effort to achieve the same result sought from the arbitrator - that Petitioner be made whole by his employer for its alleged breach of the collective bargaining agreement. By contrast, the plaintiffs in *Mitchell* and *Smart* sought relief from their unions in independent counts alleging a breach of the union's statutory duty and a conspiracy between the union and the employer.

An appreciation of this distinction makes it clear that the asserted conflict among the circuits is, in fact, illusory. The decision in the present case is unquestionably correct and no issue worthy of this Court's attention is presented.

2. This Court's decision in *International Union, UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S. Ct. 1107 (1966), conclusively rejected an argument that a uniform federal limitations period be established for Section 301 actions which allege that the arbitral process has malfunctioned. Indeed, this Court characterized that argument as a call for a "drastic sort of judicial legislation . . ." 383 U.S. at 703, 86 S. Ct. at 1111. The *Hoosier Cardinal* decision expressly sanctioned a potential lack of uniformity not only among the various circuits, but, indeed, among the various states within each circuit as the federal courts considered the appropriateness of various limitations provisions in various procedural and factual circumstances. The rationale in *Hoosier Cardinal* was sound and no reason has been advanced by Petitioner for re-examining that decision. The "conflict" relied upon by Petitioner is nothing more than the expected and desireable result of the implementation of this Court's decision in *Hoosier Cardinal*.

3. The fundamental distinction of this case from the circumstances presented by *Mitchell, supra,* makes it clear that the grant of a Petition for Writ of Certiorari in *Mitchell* is not supportive of the instant Petition.

4. Petitioner also urges grant of the Writ on the ground that this Court, in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1966), somehow "impliedly concluded that a Section 301 suit filed two years subsequent to an arbitration proceeding was consistent with national labor policy." (Petition at p. 7.) The essence of Petitioner's argument is that application of a three month limitations period in *Hines* would have rendered that action untimely and, therefore, hearing and acting favorably on the *Hines* appeal was a prospective disapproval of the Third Circuit's decision in the instant appeal. Petitioner's argument in this regard is specious, for several reasons.

First, as is conceded in the Petition, the defendants in *Hines* never pleaded the statute of limitations as an affirmative defense as required by Fed. R.C.P. 8 (c). The timeliness issue was thus never raised by the defendants in *Hines* and was never properly before any of the *Hines* courts, including this Court. *Hines* could not have spoken to this question in any respect.

Second, even if we accept the argument that *Hines* constitutes an "implied holding" that a two year period of limitation is "consistent" with federal labor policy, such a conclusion is plainly immaterial in this case. The Circuit Court was constrained to select the *most appropriate Pennsylvania* period of limitations. Neither party asserts a two year period as one of the choices. Certainly, any of a relatively broad range of different state limitations periods might be inoffensive in terms of federal labor policy. But in this case, the only arguably appropriate periods are three months and six years.

The three month period is clearly the most appropriate one to apply to the issue as it was properly characterized by the Third Circuit. The alternative choice proposed by Petitioner is not only inappropriate but inconsistent with federal labor policy.

IV. CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Richard H. Zamboldi, Esquire
ELDERKIN, MARTIN, KELLY,
MESSINA & ZAMBOLDI
800 Commerce Building
Erie, Pennsylvania 16501
(814) 453-7129

Counsel for Respondent